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No. 433

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

ELMER RUEHRUP,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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To the United States Court of Appeals for the Seventh Circuit.

Petitioner, hereinafter referred to as the defendant, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on June 24, 1964.

I.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported.

The opinion is set forth as an appendix hereto, p. 45.

II.

GROUND OF JURISDICTION OF THIS COURT.

The date of the judgment of the Court of Appeals sought to be reviewed is June 24, 1964.

A timely petition for rehearing was filed by the petitioner, and was denied by the Court of Appeals July 27, 1964.

The statute believed to confer jurisdiction to review the judgment by writ of certiorari is Tit. 28, U. S. C., § 1254 (1).

III.

QUESTIONS PRESENTED FOR REVIEW.

[a]

Consistent with the right to assistance of counsel vouchsafed by the Sixth Amendment, as interpreted by this Court in **Escobedo v. Illinois (June 22, 1964), ... U. S. ..., 84 S. Ct. ..., 12 L. Ed. 2d 977, Massiah v. U. S. (May 18, 1964), ... U. S. ..., 84 S. Ct. ..., 12 L. Ed. 2d 246, and Spano v. New York (June 22, 1959), 360 U. S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265,** may there be received in evidence in a criminal case a self-incriminating statement of the defendant taken from him by an agent of the Federal Bureau of Investigation prior to the lodgment of a formal charge against the defendant but after intended prosecution had focused upon him, when such statement was taken by the agent (1) in the absence of previously-employed counsel for the defendant, (2) after the agent had been informed that the defendant had employed counsel, and (3) after the agent had informed the defendant that the presence of his counsel was not necessary?

[b]

Consistent with Section 2 of Article III of the Constitution, and with the Sixth Amendment thereto, requiring trial of a federal crime in the state and district wherein the crime shall have been committed, may a defendant, charged with the violation of a federal statute by the filing of false statements in the Southern District of Illinois, be convicted of the charge in the United States District Court for the Southern District of Illinois when the proof shows that the statements were filed in the Eastern District of Missouri?

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Article III, § 2, Constitution of the United States: "* * * The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed * * *."

Amendment VI, Constitution of the United States: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

U. S. C., Tit. 18, § 1014: "Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the * * * Farm Credit Administration, * * * or any division, officer, or employee thereof, * * *

shall be fined not more than $5,000 or imprisoned not more than two years, or both."

U. S. C., Tit. 18, § 3237 (a): "Except as otherwise provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which said offense was begun, continued or completed."

V.

STATEMENT.

[References thus: (App.) are to Appellant's Appendix in Court of Appeals.]

This is a prosecution for violation of Tit. 18, U. S. C., § 1014,[1] by the making of false statements for the purpose of influencing an agency of the Farm Credit Administration. Prosecution was by information, the defendant having waived an indictment. The information was in three counts, alleging violations on Oct. 20, 1959, on Apr. 25, 1960, and on Dec. 13, 1960. In each instance, the violation charged was the making of an overstatement of the quantity of soybeans held in the elevators of the Alhambra Grain and Feed Co., Alhambra, Ill. The defendant was manager of the company. Alhambra is a village in northeast Madison County, Ill.

The jury's verdict was guilty on each of the three counts. The sentence was two years in custody on each

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[1] U. S. C., Tit. 18, § 1014: "Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the * * * Farm Credit Administration, * * * or any division, officer, or employee thereof, * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both."

count, with the terms of custody to run concurrently. The Court recommended release after four months. There was no fine.

Facts in Evidence; Course of Trial.

Defendant was born in 1922 at Alhambra, and at 18 years of age, after graduation from high school, went to work for the Alhambra Grain and Feed Co. (hereinafter called the elevator company) as a laborer (App. 58). This was in 1941 (App. 58). In 1942 he left the elevator company to work as a truck driver for the Illinois Farm Supply Co., but after a short while entered military service (App. 58).

While he was in military service, the elevator company offered him employment at his discharge (App. 58), and within 10 days after leaving the military service in 1946 he went to work for the elevator company as assistant to its manager, one Apple (App. 59).

In 1948 Apple retired and defendant became manager (App. 59).

The elevator company had for years been a borrower from the St. Louis Bank of Cooperatives at St. Louis, Mo., an agency of the Farm Credit Administration, and had periodically filed with it statements showing the quantity of grain on hand. In connection with its grain storage business, it had engaged in the business of processing soybeans into oil and meal by the so-called "expeller process." The "expeller process" rendered meal and oil by squeezing the beans between rollers (App. 59). It was less efficient than the "solvent extraction process" by which a chemical was applied to the beans to cause the production of oil, with a resultant meal (App. 59).

The elevator company, using the expeller process, was in direct competition with mills using the more efficient

solvent extraction process, and had to meet the prices of the more efficient mills. So that the prices might be met without the showing of losses on the books, the actual quantity of soybeans processed was not entered, but instead there were entered arbitrary totals obtained by calculating the number of bushels which would have been used to produce the oil and meal rendered if the more efficient solvent extraction process had been employed (App. 59, 60).

Since the practice invariably resulted in the recording of lesser withdrawals of soybeans from stock than were in fact withdrawn, there developed an ever-increasing distortion of the recorded inventory.

Early in January of 1961 the St. Louis Bank of Cooperatives sent a team to the elevator company to make actual measurement of the grain on hand (App. 53). They were met by the defendant, who told them frankly that the storage facilities did not contain the quantity of soybeans stated on the grain reports, and estimated the deficiency to be about 100,000 bushels—an estimate which proved to be substantially correct upon actual count or measurement.

Soon after the check of the physical inventory by the representatives of the St. Louis bank in January of 1961 the elevator company was adjudicated a bankrupt, and the defendant Ruehrup retained counsel at or about this time (App. 39).

Thereafter, at some undetermined time, the government began investigation of possible criminal aspects of the situation, and on Aug. 8, 1962, Robert Trout, a special agent of the Federal Bureau of Investigation who had been assigned to the matter, called at defendant's farm home to question defendant (App. 27). The agent was informed that the defendant had an attorney, but, accord-

ing to the defendant, told the defendant that the presence of his attorney was not necessary (App. 31, 47).

After interviewing the defendant, Trout returned to his office at Springfield, Ill., and wrote up a statement, in the first person, for the defendant to sign (App. 30). The statement not only reviewed in detail the transaction with reference to the difference between the actual and recorded soybean inventory, but also interwove a separate prior transaction involving various fictitious contracts concerning the sale of soybean oil (App. 53-55).

The following day, Aug. 9, 1962, Trout returned to the defendant's farm and procured defendant's signature to the statement, and also the signature of defendant's wife as a witness (App. 30).

Within 11 days thereafter the government moved to initiate prosecution of the defendant (App. 39).

At trial the government caused the identification of the statement by Trout, and offered it in evidence as Gov. Exh. 34. The defendant objected (App. 28-50), but after extensive argument and the reception of evidence, the objection was overruled (App. 50). The defendant later sought the expungement or obliteration of the recitations in the statement concerning the fictitious oil contracts, but this too, was denied (App. 57, 58).

No independent evidence, i. e., evidence dehors the statement itself, was ever introduced as to the fictitious oil contracts by the government.

GOVERNMENT'S EXHIBIT 34.

Gov. Exh. 34, so admitted, was in words and figures as follows:

"Alhambra, Illinois, August 9, 1962

"I, Elmer H. Ruehrup, make the following voluntary statement to Special Agent Robert B. Trout, who has

identified himself to me as a Special Agent of the Federal Bureau of Investigation, United States Department of Justice. No threats, promises, or duress of any kind have been used to induce me to make this statement. I realize that I have the right to consult an attorney prior to making any statement, and I also realize that any statement made by me may be used against me in a court of law.

"I am 40 years of age and a graduate of Highland, Illinois High School. In 1940 I was employed as a helper by the Alhambra Grain and Feed Company, Alhambra, Illinois. Subsequently I worked for the Madison Service Company and in 1942 entered service with the United States Army. In 1946 I was discharged and returned to Alhambra Grain and Feed Company as an Assistant Manager. In the fall of 1948 I became Manager and retained that position until January 4, 1961. As Assistant Manager I learned very little concerning the management of the company and at the time I became manager I was not well informed concerning the duties and responsibilities of that job. The Alhambra Grain and Feed Company, besides buying and selling grain, operated an expeller which processed soy beans into meal and oil. Early in the year prior to my taking over as Manager, the processing of soy beans had been very profitable because of unusual market conditions and by February there was a profit of $70,000.00; however by the end of September of that year, which is the end of their fiscal year, there was a net loss of $33,000.00. Historically, small processing plants operating with expeller equipment find it difficult to make a profit largely because larger plants using a solvent process can extract two or three pounds of oil more per bushel than can be done by means of the expeller method. This fact makes it hard to compete.

"A perpetual, or running inventory, was maintained by the Alhambra Grain and Feed Company on all grain, and

actual inventories were not regularly taken. The firm had a loading-out scale at the old elevator which weighed soy beans as they were transferred to the processing plant. This scale recorded weights on a continuing meter and had it only been used to record soy beans transferred to the processing plant it would have accurately reflected the amount of beans used in the plant. However, in addition to the reflecting beans used by the processing plant, it was also used to weigh beans sold in the open market as well as to weigh other grain. On some occasions beans used in the processing plant were not even passed through the loading-out scale. If all weights other than soy beans transferred to the processing plant were properly noted it would still be possible to accurately reflect the weight of beans processed; however, experience indicated that because of human failings records of such other weights were not always noted, thereby causing the meter to reflect an inaccurate figure as to the amount of beans transferred to the processing plant. Because of this the weighing of the beans processed was discontinued and a system of estimating the transfer of beans was adopted where the bushels of soy beans put in process for a given month was determined by computation on the basis that a bushel of beans would produce 50 pounds of meal. If the processing plant could not realize a profit at that input, the amount of beans transferred to the mill was arbitrarily understated by an amount necessary to show a profit and the understated figures were given to the bookkeeper. The reason that the understatement of soy beans transferred to the mill never showed up as an excessive shrinkage at the elevator was due to the fact that the amount of the understatement remained in the ending inventory figure. Since the inventory was on a perpetual basis, the inventory was pyramided through the years which resulted in a high overstatement of soy bean inventory at the time when an actual physical inventory was made.

"Early in 1961, in company with James Nedimeyer, Accountant of the St. Louis Bank for Cooperatives, I spent several weeks going over the records of the Alhambra Grain and Feed Company to attempt to compute the amount of overstatement of inventory. This was done by using a conversion figure established as a national average production figure of soy bean processors of 48 pounds of meal per bushel of beans processed. This computation was done for each year that I was Manager and for the periods of October 1, 1960, to December 31, 1960, and December 31, 1960, to January 7, 1961. The schedule prepared by us reflects that approximately $505,000.00 worth of soy beans were used at the mill over and above that which was reflected on the books and records of the company as having been used.

"In addition to the inventory shortage, as indicated above, there is another shortage of $96,779.55 consisting of non-existent oil contracts which were shown on the company books as assets. These oil contracts accumulated through the years 1956 to 1960 and were included in the records of the company in order that the company books would show a profit for the years in question even though there were actual losses during those years. These non-existent oil contracts were for the following amounts:

Year	Total Amount of Nonexistent Contracts	Increase (or Decrease) During Year
1956	$38,173.80	$38,173.80
1957	78,375.85	40,202.05
1958	92,253.35	13,877.50
1959	97,676.25	5,422.90
1960	96,779.55	(896.70)
		$96,779.55

"The above total of $96,779.55, together with the computed inventory shortage of $505,168.46 amounts to a total loss in operations of $601,448.01, which is $32,550.89 more than the loss of $569,397.12 reflected in the tentative balance sheet of December 31, 1960. This difference may be accounted for by slight variations from the 48 pounds of meal per bushel used in the computation of the inventory transaction. It may also be accounted for by screenings and foreign material which were normally percentage fed through the mill and which were not accounted for in the calculations.

"In 1954 or 1955 the St. Louis Bank for Cooperatives required that the Alhambra Grain and Feed Company engage in hedging operations to protect the firm from losses due to drop in the market in connection with grain purchased in the harvest season in September and not processed until later in the following year. In order to effect this, at about the time of purchase the Alhambra Grain and Feed Company would sell soy beans and or soy bean oil futures in an amount somewhat less than the actual amount of grain purchased. This hedging operation was new to me and not thoroughly understood by me, and as a result the firm lost money due to the same. Along the same line grain futures were occasionally purchased to protect the company for price increases on grain which was purchased subsequent to harvest and needed to keep the expeller plant in operation throughout the year, because the elevators operated by the plant held only a total of 210,000 bushels of grain and the expeller plant used from 240,000 to 340,000 bushels of grain in a year. It was necessary to keep the mill in continuous operation as failure to do so would very likely result in the loss of customers. In order to keep customers it was necessary to service them continuously. If they were forced to on occasion do business with a firm using a solvent method of extraction they would have to change their formula, and once the formula was changed it was doubtful that they

would change back again, as to do so would be an annoyance to them. The firm would have no difficulty in obtaining meal resulting from the solvent method of extraction continuously and it was felt necessary for the Alhambra Grain and Feed Company to provide feed manufacturers and farmers with meal from the expeller method on a continuous basis as well. Experience established that grain purchased after harvest season was generally higher priced and to protect against this price rise it was felt advisable to engage in a hedging operation. However, because of my lack of experience and understanding of the market the Alhambra Grain and Feed Company actually lost money because of my activities in this endeavor.

"In connection with the nonexistent contracts which were maintained in the records of the Alhambra Grain and Feed Company, I utilized some blanks of the Pat Lobban Company, which were available at the office of the Alhambra Grain and Feed Company. I filled out these blank contracts myself on one of the office typewriters. No one else at Alhambra Grain and Feed Company or at the Pat Lobban Company was aware of my activities in this connection. Prior to the time that I prepared these nonexistent contracts the company had actually had some contracts with Pat Lobban Company and on one occasion I could not locate the contracts but desired to have them in order to attach them to bills of lading and weigh slips pertaining to them. In order to do this I requested a girl in the office of Pat Lobban and Company, whose identity is unknown to me, to send me some blank forms, which she did. She actually sent me more forms than I needed at the time and the balance not used were retained by me. It was these forms which I used in preparing the fictitious contracts. To my knowledge, Pat Lobban was not aware of the fact that I had received these blank forms.

"No entries were made on the books and records of the company by me or by the bookkeeper, and they were not

recorded until the auditor advised the books at the end of the year, September 30. I did not sign the fictitious contracts giving no particular thought to it. The auditor was unaware of my activities in this regard, to the best of my knowledge.

"In all my dealings with the Alhambra Grain and Feed Company I have never been motivated by personal gain nor have I taken anything other than my regular salary as an employee. I had hoped that over a period of time that the processing end of the business would ultimately show a profit and at that time absorb the understatement of beans transferred to the mill as well as the loss reflected in the fictitious oil contracts. The effect of my activities as explained herein resulted in payment of dividends to stockholders which dividends would have not otherwise been paid. I realized that my activity as described herein would cause the St. Louis Bank for Cooperatives to be furnished with false financial information, and information which indicated a more favorable condition than actually existed. I have this statement [sic] consisting of this and 7 other pages and it is the truth to the best of my knowledge and belief.

"[signed] Elmer H. Ruehrup.

"Witnessed by:

"Edith E. Ruehrup, Alhambra, Ill., 8-9-62.

"Robert B. Trout, Special Agent, FBI, Springfield, Ill., 8 9/62."

The proceedings had in connection with the receipt of the defendant's statement in evidence at the trial were out of the presence of the jury, and were as follows:

Mr. Baetz [counsel for the defendant, to Mr. Trout]: Your name is Robert Trout, and you are the Federal

Bureau of Investigation representative who was on the stand just prior to this session out of the presence of the jury?

A. Yes, sir [App. 31].

Q. I have reference, Mr. Trout, to the dates of August 8 and August 9, 1962. On August 8, 1962, you have testified you went and had an oral conversation and took, in substance, an oral statement from the Defendant, Elmer H. Ruehrup, at his home near Alhambra, Illinois, and you have stated, as I recall it, that no one was present at that particular time except you and Mr. Ruehrup, that later, his wife appeared and signed as a witness to a subsequent written statement. But on August 8, at the time of the oral statement, no one else was present, is that correct?

A. Yes, sir.

Q. My question to you, sir, is, at the time you took the statement on August 8, 1962, did you know that Mr. Ruehrup was represented by counsel?

A. Your question is, at the time I took the statement?

Q. Yes, and by that, I mean at the time you had the oral conversation you have spoken about.

A. I have a recollection that Mr. Ruehrup indicated to me that he was represented by counsel.

Q. Does your recollection extend to the identity of the counsel? That is, did you know the name?

A. No, sir.

Q. Did Mr. Ruehrup ever tell you the name, or have you just forgotten it? [App. 32.]

A. He may have.

Q. He may have told you, but you have forgotten it today?

A. As a matter of fact, I also have a recollection that Mr. Ruehrup did indicate to me——

Q. You have a recollection but you can't remember it now?

A. No, this recollection is not completely clear, but it was—that is as—as accurate a statement as I can make.

Q. I appreciate that, sir. Now then, you went away, as I understand it, to your office, and you typed up a statement for Mr. Ruehrup to sign, and the next day you went back and gave him this statement, is that correct?

A. Mr. Ruehrup and I, while outside his home and in my car, the car I was driving, went over this statement in detail and made changes in the statement, and this statement was read by Mr. Ruehrup.

Q. Yes.

A. And subsequently, on that occasion signed by Mr. Ruehrup in the presence of his wife and myself.

Q. I understand. My present question is directed to this fact, which, I think, is correct, that you took the oral statement—you had the oral conversation with the gentleman, then typed up a statement in the first person, purporting to be a statement of Elmer Ruehrup, and then the next day, August 9, 1962, you went back to the farm home, to the man with that statement. Have I got the routine right? And you testified that when you went back there, you went over the statement and made some corrections?

A. Yes, sir.

Q. And then he later signed it, and you called his wife out to sign as a witness to—or he called the lady out—somebody brought the lady out to sign as a witness?

A. That's right. [App. 33.]

Q. No, at that time, I assume, from what you said at that time—previous day—that he had counsel, and your recollection is that you were even told his name that you were also told that on August 9, 1962? In other words, Ruehrup didn't tell you in the meanwhile that he desired his attorney, did he?

A. He did not.

Q. He did not. I'm sure that's all right. Tell me, Mr.

Trout, ordinarily, do members of your body take a statement from a person represented by counsel in, at least a potential criminal case——

Mr. Scroggins: (Interposing) Now, I'm going to object to that question. I don't think that has anything to do with this hearing, whether they ordinarily take statements or what they ordinarily do.

The Court: That objection is sustained. I don't think in this case this is important.

Mr. Baetz: Q. Mr. Trout, when you talked to Mr. Ruehrup, did you know that a criminal case was in preparation against him?

A. I can't answer that question, in preparation.

Q. Perhaps my question is not as certain as it might be. I'll ask you this: Had you been in communication or contact with the United States Attorney's Office at Springfield with reference to criminal charges being prepared against Mr. Ruehrup?

A. May I answer that question by just informing exactly what did happen?

Q. Yes, certainly, that's what we want to know.

A. An investigation was initiated upon request by the United States Attorney's Office to interview Mr. Ruehrup in connection with shortages of the Alhambra Grain and Feed Company.

Q. Could you tell us what individual in the United States Attorney's Office made the request to you? [App. 34.]

A. I believe the request was by letter over the signature of Mr. Phelps.

Q. You don't by any chance happen to have that letter here with the rest of your files, do you? I notice you have a voluminous file out there.

A. No, sir, I don't have it.

Q. Could you tell us by recollection, how long prior to the visit to the Ruehrup farm, Mr. Phelps wrote you to check the matter?

A. Several months.

Q. Several months? Was there any doubt in your—and you've been an F. B. I. man for twenty years—did I understand that right?

A. Yes, sir.

Q. Was there any doubt in your mind upon receipt of that letter from the United States Attorney's Office, that criminal prosecutions were at least possible or contemplated in this case?

A. You say possible or contemplated?

Q. Either one, sir, or both.

A. Possible, but whether contemplated, I don't know.

Q. I see. Now then, when you went to the Ruehrup farm and talked to Mr. Ruehrup, did you tell him in substance this, and it's going to take me more than one sentence, and you wait 'til I'm finished and you can correct me: Ruehrup, the only thing we are necessarily interested in is to establish that you did not take any money out of this transaction, and that thus we will be enabled to close this case without prosecution, because the charge would be embezzlement, and if you didn't take any money, you would not be prosecuted, period. Did you tell the gentleman that in substance? I know those don't purport to be your exact words?

A. Neither in exact words nor in substance. [App. 35.]

Q. What, if any, reason did you give this man for taking the statement from him at that time? Did you explain it, at all, why you were taking his statement?

A. I explained that we were investigating the matter involving a shortage, and that I desired to question him concerning his activities relative thereto; and at that time—and before any specific questions were asked, I told him that—words to the effect that the interview was entirely voluntary. He did not have to answer questions and that if he desired to do so, he had the right to consult an attorney.

Now, it is my further recollection, and this is not supported by any written information—I have a vague recollection that in the discussion which immediately followed, Mr. Ruehrup indicated that he had been represented by an attorney, and I have a vague recollection, and this is vague, but I say it because I want to be accurate as I can possibly be, that Mr. Ruehrup's attorney was not available and, possibly, that he was out of town.

Q. In justice to you, I think that your impression is correct.

May I ask why you were not willing to defer any request to this man until after his attorney was available?

A. Mr. Ruehrup informed that he had already discussed the matter and made admissions to others, very likely admissions to the directors, and having done so, he saw no reason as to why he could not discuss the matter with me at that time.

Q. I take it from your prior answers, there is no question but that you did not tell Ruehrup that a criminal prosecution was possible or in preparation. It was not even mentioned during your interview. Is my statement correct?

A. Not exactly.

Q. Correct it, please sir.

A. May I ask a question?

Q. I see no reason why you can't. [App. 36.]

A. In testifying before the Jury, I gave an answer to a specific question as to whether or not at the beginning of this interview I had told Mr. Ruehrup that any statements that he might make could be used against him in a court of law. It was a specific question, and I answered that at some length by indicating that on the next day when I had presented him a written statement, that the statement did specifically contain that phrase.

Now, I am not sure exactly how I phrased any comment concerning possible court action, but it is very likely

that I informed Mr. Ruehrup to the effect that what he told me could be used against him.

Q. Well, you knew, of course, at the time from your investigation of the case, that there was already an action "in a court of law," and you knew at the time that you—when you talked about a court of law that the man you were talking with—meant the bankruptcy case which was pending, didn't you?

A. What you refer to by already a court of—an action in a court of law?

Q. From your investigation, was there not a bankruptcy action already pending in this case in which Ruehrup had been called for examination?

A. Yes, sir.

Q. And I'll ask you, as a man experienced in this, didn't you or did you realize that when you talked about the use of this statement in a court of law, that you are an auditor, might well conclude that you were talking about this bankruptcy case?

In other words, to perfect——

A. (Interposing) Who might conclude?

Q. The man who was here—you—the man you are talking to.

A. No, that was not the case.

Q. You are positive that he didn't think you were referring to the bankruptcy proceeding? [App. 37.]

A. We were discussing this matter concerning his right to an attorney and so forth, and prior—and at that time I told him that we were investigating the shortage of grain at the Alhambra Grain Company, and to my recollection, there was nothing said concerning the bankruptcy, and I'm absolutely positive that I had no intention of conveying such and did not convey such.

There was a possibility that the Bankruptcy matter could be investigated as such, but that was not paramount in my mind in discussing this matter with Mr. Ruehrup.

The nature of the questioning was along the lines that would not concern violations of the National Bankruptcy Act.

Q. Mr. Trout, as a matter of fact, did you tell Mr. Ruehrup that the giving of this statement was his chance to get in as a matter of record the fact that he did not personally profit one penny by these transactions? Did you tell him that substantially?

A. No, I did not. I included in the statement comments to that effect, but I did not initiate that aspect or intent to prevail upon him to make the statement by that condition.

There was no reluctance on the part of Mr. Ruehrup to discuss this matter, and there would be no such reason for me making any such comment, and I might say that Mr. Ruehrup was as—very cooperative and not hesitant about discussing anything that I asked him about.

Q. So cooperative and unhesitant that you knew that he didn't think he was talking for use in a criminal court, didn't you?

A. No, sir. [App. 38.]

Examination of Witness Trout, by Mr. Scroggins, Assistant United States Attorney.

Q. I take it in this instance the initiation of the investigation was from the United States Attorney's Office, is that correct?

A. Yes, it was.

Q. And would any decision as to whether to prosecute or to institute any type of a criminal proceedings would not be made by you, Mr. Trout?

A. No, sir.

Q. Who would make that decision?

A. United States Attorney.

Q. And I gather from your testimony that you advised Mr. Ruehrup that he could have his attorney present at

the time you talked to him if he so desired, isn't that correct?

A. There is no question about that.

Mr. Scroggins: That's all the questions I have.

Mr. Baetz: Did Your Honor have anything?

The Court: And he reiterated to you that it didn't make any difference whether his attorney was present, because he made the same statement to numerous other people, is that correct, including the directors of the corporation?

The Witness: He indicated that to me, Your Honor.

The Court: When you say he indicated, what do you mean by that?

The Witness: Well——

The Court: (Interposing) He'd have to use words to tell you, didn't he?

The Witness: Yes, I say indicated, because at this time I don't recall exactly the words of the conversation.

The Court: Oh, I see, but that was the effect of what he said to you in the conversation?

The Witness: Yes, it is the effect. [App. 39.]

The Court: Well, I don't know what you want that written statement in there for any way. You don't need it.

Mr. Scroggins: I'm not worrying about this written statement so much. I understand there are some things that Mr. Baetz wouldn't want in the statement.

Mr. Baetz: I'm not through yet. Could I proceed?

The Court: Go ahead.

[Proceeding out of the presence of the jury continued.]

GORDON BURROUGHS,

called as a witness by the defendant, testified as follows:

Examination, by Mr. Baetz.

My name is Gordon Burroughs; I live at Edwardsville, Illinois; I am a practicing attorney. I was attorney for

Elmer Ruehrup, the defendant, in 1962. The relationship began in 196 or 1961, after the alleged shortage was discovered at Alhambra. I was called to a meeting and attended a meeting of the board of directors as his attorney.

I was contacted in 1962 by Mr. Phelps, the United States Attorney, in 1962 with reference to arrangements in connection with the criminal prosecution of Mr. Ruehrup. I believe it was on August 20, 1962. I think Mr. Ruehrup called me and said he had been contacted by Mr. Phelps, and asked me to call Mr. Phelps. I have a memorandum here that states that I called Mr. Phelps at 3:57 p. m. on 8/20/1962. The discussion was whether we would waive an indictment and accept an information; and at that time, Mr. Phelps and I agreed on the date—September 4 or September 10, alternately. He was to let me know by letter.

Q. Can you tell me, Mr. Burroughs, whether any representative of the United States Attorney's Office, in any way, participated in bankruptcy proceedings prior to the date you have just mentioned?

A. Yes. [App. 40.]

Q. Mr. Waldo Ackerman and Harlington Wood?

The Court: Wait a minute. They are not United States Attorneys. They were attorneys for the receiver.

Mr. Baetz: Q. And Mr. Harlington Wood, Attorney for the receiver in bankruptcy?

The Court: Receiver, not the United States Attorney, no.

Mr. Baetz: No?

The Court: That was the question you asked.

Mr. Baetz: I don't—I don't know when their office changed.

The Court: They were appointed after, but The Court knows that himself.

Mr. Baetz: Q. May I question his—and you may answer yes or no. Did any representative of the United States

Attorney's Office participate in the bankruptcy hearing in any way, and if you don't remember, you can say that?

A. I don't remember what their official capacity was—Mr. Waldo Ackerman and Harlington Wood. [App. 40.]

The Court: Mr. Waldo Ackerman was never a United States Attorney.

The Witness: I have no knowledge of their—what their capacity——.

The Court: Well, you can't say they are in the United States Attorney's Office.

The Witness: I'm not saying they are. I'm saying I don't know if they were or not.

The Court: I wouldn't make such a statement like that on this record unless you knew it, because you leave the insinuation that they have been.

The Witness: I don't want to leave that insinuation. Let's get the record straight on that then.

I know of my own personal knowledge that when that bankruptcy was going on that Harlington Wood was no longer the United States Attorney, and I also know that Mr. Waldo Ackerman was never a United States Attorney.

Mr. Baetz: Your Honor, I didn't know that, and I don't think Mr. Burroughs knew it. We have no desire to misrepresent anything here. [App. 41.]

Now, the status of Mr. Wood and Mr. Ackerman has been established so don't advert to them.

The Court: They were the attorneys for the receiver.

Mr. Baetz: Receiver.

Q. I still want to get his definition knowledge. To your knowledge, and don't say if you don't know, was any person of the United States Attorney's staff present at any of these bankruptcy meetings?

A. No.

Q. All right now, when you were contacted by—or when you were contacted—or when you contacted Mr. Phelps, who is the present United States Attorney, there were

discussions, you said, about accepting an information and not insisting on an indictment, and, I assume that as usual, in criminal cases, there was discussed what disposition might be recommended by the United States Attorney's Office in the case?

Mr. Scroggins: I'm going to object to that.

The Court: That will be sustained.

Mr. Baetz: I didn't ask him what they were, and I was going to caution him if the counsel would give me a chance.

The Court: I don't know that it would be pertinent. It's after this thing you are interrogating this witness about.

Examination of the Witness Burroughs, by Mr. Scroggins.

I had represented Mr. Ruehrup for some 20 months prior to August 8, 1962. I have been in practice for a number of years and have a large clientele. As I remember, on August 20, 1962, Mr. Ruehrup called me and said that Mr. Phelps had contacted him, and he would like for me to contact Mr. Phelps. [App. 42.]

Q. Ordinarily, if Mr. Phelps had known that you were the attorney, would it not have been more logical for him to have contacted you in the first instance, Mr. Burroughs?

A. I would assume he should have, yes, sir.

I might add this: that I had been out of town during the first part of August, in Hawaii.

Mr. Baetz: Now, I don't want to put the United States Attorney under oath, and I will not do so. May I inquire, Mr. Scoggins, do your files show * * * that prosecution was contemplated on the 8th and 9th days of August, 1962, in this case?

Mr. Scroggins: Oh, I can't say. I can't answer that.

Mr. Baetz: You don't know that? Do you know whether the United States Attorney's Office had been

working with the Federal Bureau of Investigation on a possible prosecution of this case before August 8, 1962?

Mr. Scroggins: Well now, in answer to the first question and in answer to this question, all I can say—state is what Mr. Trout has testified to here, that a letter was directed to the F. B. I. over the signature of Mr. Phelps, that he had received a communication, that is, the United States Attorney had received a communication that, enclosed they would find a copy of that communication—I would appreciate your investigating the contents of this communication and reporting the results to my office.

Mr. Baetz: That was the extent——

Mr. Scroggins: (Interposing) That was the extent——

Mr. Baetz: (Continuing) ——then?

Mr. Scroggins: (Continuing) ——to my knowledge, and I don't have my files here.

Mr. Baetz: I know you don't have your file. We understand that. [App. 43.]

Then, because of the rapidity with which the thing developed, I may assume, was that statement given to you by the F. B. I., that's Government's Exhibit 34 which has been in issue?

Mr. Scroggins: That has been in Mr. Trout's possession since that day.

Mr. Baetz: • • • Was the copy given to you right after it was taken?

Mr. Scroggins: I don't know how soon afterwards our files will show.

Mr. Baetz: In other words, the United States Attorney performed the normal—But they contacted Mr. Burroughs 11 days after the statement was taken?

Mr. Scroggins: Well, that's your statement, not mine.

Mr. Baetz: All right.

The Court: Is that all you want?

Mr. Baetz: That's all I have, Your Honor. Let the record show the Defendant now moves to strike the testi-

mony of the witness Trout with reference to an oral conversation with the Defendant and objects to the offer of Government's Exhibit 34 if and when it is offered—I don't think it's technically been offered yet—on the ground that the United States Government knew that a prosecution of this man was in contemplation, knew that he had an attorney and secured the statement without obtaining the attorney's presence.

The Court: Well now, on what extent—with what you've got showing in this record, now I don't think the evidence shows you can make that motion, unless you can raise a question of fact disputing what this F. B. I. agent has said. [App. 44.]

ELMER RUEHRUP,

the defendant, taking the stand in his own behalf, testified as follows (out of the presence of the jury):

Examination, by Mr. Baetz.

My name is Elmer Ruehrup; I am the defendant; I remember Mr. Trout coming out to my farm on August 8, 1962.

Q. Tell the judge here what Mr. Trout told you as to the reasons for his presence on that day.

A. Well, Mr. Trout came out to the farm, he introduced himself, and, in substance, I was under the impression——

The Court: (Interposing) Well, did he introduce himself as being with the Federal Bureau of Investigation?

The Witness: He did. I—he did, yes, sir.

The Court: All right.

The Witness: And, when during our discussion, we—I know I told him that I hadn't taken anything, I had no personal gain in any way, shape or form, and he told me that he understood that that was right. I mean he agreed with me, and when he talked about any—

when he talked about court action—that was the only one thing in my mind, and that was——

Mr. Scroggins: (Interposing) Now, that's not responsive to that question. I'm objecting——

The Court: (Interposing) You ask questions here of your client, now. You bring out what you want to bring out here for your client.

Mr. Baetz: Yes, Your Honor, I'll have to do that.

Q. Mr. Ruehrup, please listen to my questions and then answer them, because the Court does not want general statements.

A. Yes, sir.

Q. What, according to your recollection, did Trout say to you when he came to the farm? [App. 45.]

A. That he was a member of the F. B. I. and that he wanted a statement from me.

Q. Did you—what did you say in response to him?

A. I told him that my counsel was out of town, but I would discuss the matter with him, and that was it.

Q. What did he say next?

A. He started writing, if I understand, when he was taking this oral statement—he took notes.

Q. Look, my question is, what did he say next? The Court wants you to respond to the questions. Please, try and do that.

The Court: Well, I think that he could explain it that notes were taken.

Mr. Baetz: Q. All right then, you can explain—explain as you started to, before I interrupted you.

A. He started to take this statement in note form, and as he took this statement, we were constantly in conversation, and the thing that was solely on my mind——

Q. (Interposing) Well now, listen, that is what the Court said to stop. We are talking about what was on your mind. We are talking about what people said.

The Court: What was said and what was done—we want to know. That's what we want to know.

Mr. Baetz: Q. Now, let me ask you some direct questions. What, if anything, did the gentleman say about what you should say to your attorney?

The Court: Well, let me ask him this question.

Did he tell you that you had a right to have the attorney present?

The Witness: Yes, sir.

The Court: And you told him that Mr. Burroughs was not available and was out of town, did you?

The Witness: Yes, sir. [App. 46.]

The Court: And you told him that it wouldn't be necessary then to have your attorney present, is that right?

The Witness: No, sir.

The Court: What did you say, then?

The Witness: I told him that——

The Court: Now, he led up to the point where he told you you were entitled to be represented by counsel and have him present. Now, what happened after that? What did you say after that?

The Witness: I told him that—I should say that he told me that this statement—that was to make clarification of my personal taking of funds from the—from the company, which would be an embezzlement charge.

The Court: You mean to tell me that he told you that, now?

The Witness: In substance.

The Court: Did he use those words, or are you just supposing that he said those words to you?

The Witness: In substance, that was my understanding, sir.

The Court: All right, proceed.

Mr. Baetz: Q. Now, did he tell you that—did he make any statement to you as to whether this statement that he was taking would be employed to show that you did not take any of the money?

A. Yes, sir.

Q. How long did you talk there that afternoon?

A. I'd say it was an hour or more.

Q. During the course of that conversation, did you ever tell him that if your attorney were in town, you would like him present?

A. Yes, I did.

Q. Did you know where Mr. Burroughs was?

A. I did.

Q. Did the Federal Bureau of Investigation agent make any statement to you as to whether it was necessary for you to have your attorney present? [App. 47.]

A. He said, it wasn't necessary.

Q. Was there anyone else present during that day and I have reference again to August 8, 1962?

A. I don't think so. The only other that could have been present—if my wife would have come out, and, probably, Mr. Trout would remember better than I, but I don't recall if she came out that first time.

The Court: Now, didn't you tell Mr. Trout, Mr. Ruehrup, when you were talking about this, that it didn't make any difference whether your attorney was present or not, because you told the story to several other people, including the directors, about the shortage of the grain?

The Witness: No, sir, I didn't tell him it didn't make any difference.

The Court: Didn't you tell him you had made statements to—about it to other people?

The Witness: I told him that I had made some statements about this operation to other people, yes, sir.

The Court: Anything further, now?

Mr. Baetz: Yes, sir.

Q. So that is August 8, 1962. Now, did Mr. Trout come back on August 9, 1962?

A. Yes, sir.

Q. What did he bring with him, with reference to papers?

A. The copy of that statement, sir.

Q. Did you know he was going back to his office the preceding day and write this up?

A. Yes, sir.

Q. Did he tell you he was going to do that?

A. Yes, sir.

Q. Did he tell you he was going to bring it back the next day for your signature? [App. 48.]

A. I don't know if he said the next day, but I'm sure he said he was going to return it.

Q. Bring it back and then when he brought it back, there were some typographical errors, and he had you correct them? Did he ask that you make corrections in there and initial them?

A. Yes, sir.

Q. And you did so.

And was it incomplete, so—and you may look at this while you're answering—so that he finished it out in longhand himself?

A. He did—he did.

Q. And——

A. (Interposing) That was not in the notes of the previous day at all.

Q. And is the final, substantially large paragraph in there where he talks about: I realize that my activities was thus and so.

That is not in your handwriting?

A. No.

Q. Was that written by the F. B. I. agent in your presence?

A. I don't know. I think it was, sir. I couldn't swear to it, but I——

Q. (Interposing) Is that your language or his?

A. It is his language, sir.

Q. Now, I mean by that—I didn't ask you if that's the writing. You already answered that.

You understand what I mean when I said: was that the language?

A. He put the last paragraph on it.

Q. Who called Mrs. Ruehrup out to witness this?

A. I think he asked me to call her out.

Q. And you called her out.

Was an explanation made to Mrs. Ruehrup as to what had been done here, or was she merely told to sign her name? [App. 49.]

A. No, sir, I think she just signed it, sir.

Q. That wasn't my question.

Was she merely told to sign her name?

A. No, I don't know, sir.

Q. You mean you don't remember, or what?

A. I don't—I think there was some explanation, but I'm sure she didn't know what she had signed. She never read——

Q. (Interposing) Did Mr. Trout make an explanation to her?

A. That I don't know, sir. We was all scared people.

The Court: Let me see it.

Mr. Baetz: Yes, Your Honor.

The Court: Well, Mr. Ruehrup, when you signed this statement first—the very first—you read this, didn't you?

The Witness: Yes, sir.

The Court: And the very first paragraph said this, "I, Elmer H. Ruehrup, make the following voluntary statement to Special Agent Robert B. Trout, who has identified himself to me as a Special Agent of the Federal Bureau of Investigation, United States Department of Justice. No threats, promises, or duress of any kind have been used to induce me to make this statement. I realize that I have the right to consult an attorney prior to making any statement, and I also realize that any statement made by me may be used against me in a court of law."

Now, that paragraph was in there, and you read it, is that correct?

The Witness: Yes, sir.

The Court: And you signed it after you read it, is that correct?

The Witness: Yes, sir.

[At this point the Court announced that it would defer its ruling until after examination of authorities submitted by counsel for the defendant. It examined the authorities, and the proceedings then resumed.]

The Court: Well, I have read the case of Spano v. The People, 360 U. S. 315, and on the strength of what is said in this case I am going to deny your motion to suppress the confession or the statement.

The trial then proceeded before the jury.

The defendant took the stand in the presentation of his defense. His direct examination was confined to his personal history and to a description of the bean processing methods of the elevator company and the reasons therefor (App. 58-61). On cross-examination, however, the government immediately began a course of questioning apparently designed to secure his concurrence from the stand as to the accuracy of the government's method of calculating (App. 61).

Defendant's counsel then attempted to object that the government was going beyond the scope of the direct examination (App. 61). The government had repeatedly urged the same objection on cross-examination of its witnesses by the defendant, and had been sustained (App. 66-68).

The learned trial judge did not permit the defendant's counsel to complete his objection, however, but interrupted him to make the statement and observation that the witness was "the defendant." The exact exchange was as follows (App. 61):

"Mr. Baetz [counsel for the defendant]: The defendant will object to this as beyond the scope——

The Court [interrupting]: This is the defendant. Overruled. This is the defendant."

The government then proceeded to extend the cross-examination into the oil contracts (App. 63), which, similarly, had not been touched upon in direct examination.

At first government counsel confronted the defendant with Gov. Exh. 34, the statement written by Trout and signed by the defendant, and inquired as to whether it was correct, and the defendant answered that it was (App. 63). Then government counsel prepared to read from the exhibit and asked the defendant, by way of preliminary, "if he did not make this statement to Mr. Trout" (App. 63).

Defendant's counsel objected on the ground that the defendant had already admitted that he did (App. 63), but the objection was overruled (App. 63), and government counsel then read a lengthy paragraph from Gov. Ex. 34, listing "nonexistent oil contracts" and stating the amounts thereof (App. 63). Defendant's counsel again objected, "on the grounds stated previously," but the Court overruled him with the following statement to the jury (App. 63):

"The Court: Now, this—I'll say that this is being admitted for two purposes: One, in response to a question that he did not know in the inventory what the oil contracts were. And, secondly, that the jury might take this into consideration for the sole and only purpose of arriving at intent, and not for the purpose of finding this man guilty under the charge of the indictment. Proceed."

There was during the trial no contention by the government that the defendant had delivered to or filed with the

St. Louis Bank of Cooperatives any statement of any kind within the State of Illinois, and there was no evidence of such delivery or filing. There was evidence that the defendant, as manager, had supplied the incorrect soybean inventory figures to one of the clerks, and that the clerk had placed grain reports, containing the incorrect figures, in the mails addressed to the St. Louis Bank of Cooperatives in Missouri (App. 68, 69).

There was no contention, and no evidence, that defendant personally profited by the transactions.

VI.

ARGUMENT FOR ISSUANCE OF WRIT.

[a]

Right to Assistance of Counsel Under Sixth Amendment.

The Court of Appeals disposed of the constitutional right-to-counsel objection in the following manner:

> "Defendant asserts that the district court committed prejudicial error in overruling his objection to the admission in evidence of a statement signed by him in the absence of his attorney.
>
> "On August 8, 1962, Robert Trout, a Special Agent of the Federal Bureau of Investigation, called at defendant's farm home to question him concerning possible criminal aspects of the soybean shortage.
>
> "Trout testified at the trial that, 'at the beginning of the interview * * * I explained the nature of my visit to * * * [defendant] and informed him that he was under no obligation to discuss the matter * * * unless he desired to do so and that prior to discussing

it, if he wished, he had the right to consult an attorney.'

"Defendant informed Trout that his attorney was out of town. Trout told him that it was not necessary that the attorney be present. Defendant stated he had made several statements to others and had no objections to discussing the matter.

"At the conclusion of their talk, Trout told defendant he desired to reduce the information to a written statement to be signed by defendant. Defendant replied he would sign such a statement.

"Trout prepared a statement in the first person and the following morning defendant signed it in the presence of Trout and defendant's wife, who signed as witnesses.

"Defendant testified as follows concerning his signing the statement:

"'The Court: And the very first paragraph [of the signed statement] said this, "I, Elmer H. Ruehrup, make the following voluntary statement to Special Agent Robert B. Trout, who has identified himself to me as a Special Agent of the Federal Bureau of Investigation, United States Department of Justice. No threats, promises, or duress of any kind have been used to induce me to make this statement. I realize that I have the right to consult an attorney prior to making any statement, and I also realize that any statement made by me may be used against me in a court of law."

"'Now that paragraph was in there, and you read it, is that correct?

"'The Witness [Defendant]: Yes, sir.

"'The Court: And you signed it after you read it, is that correct?

"'The Witness [Defendant]: Yes, sir.'

"Defendant cites *Spano v. New York*, 360 U. S. 315 (1959), and argues his constitutional rights were violated in that he was denied effective representation of counsel. He asserts that he 'occupied the same position as one under arrest,' since '[w]ithin eleven days * * * of the [signing of the statement] the government was ready to initiate prosecution, and it is fair to infer that prosecution was in mind when Trout was questioning the defendant, and preparing a statement for him to sign.'

"We find no similarity between *Spano* and the instant case. In *Spano*, petitioner had been indicted for first-degree murder. He retained counsel who instructed him to answer no questions. Petitioner was thereafter subjected to persistent and continuous questioning. He repeatedly requested and was denied an opportunity to consult his attorney. After eight hours of constant questioning he confessed. The Supreme Court reversed petitioner's conviction and stated that 'petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused,' *id.* at 323, and as a result his confession was not voluntary.

"In the present case, defendant had full knowledge of his right to consult an attorney prior to signing the statement and that the statement could be used against him in court. With this knowledge, he voluntarily signed the statement. No constitutional right of defendant was violated and the district court did not err in admitting the statement in evidence."

Although **Massiah v. U. S. (May 18, 1964), ... U. S. ..., 84 S. Ct. ..., 12 L. Ed. 2d 246**, and **Escobedo v. Illinois (June 22, 1964), ... U. S. ..., 84 S. Ct. ..., 12 L. Ed. 2d 977**, were determined and published too late for the court below to have considered them in connection with

the judgment now sought to be reviewed,[2] it would seem that they clearly indicate that the view of the Court of Appeals, in assessing the breadth of the holding in Spano and of the protection of the Sixth Amendment, was far too narrow.

Spano did not turn on the pure question of the voluntariness of the confession induced, which would have involved the Fifth Amendment alone, but on the nature of the persuasions and misrepresentations employed by the prosecution to obtain the confession in the absence of counsel, which involved the Sixth as well. And if this interpretation of **Spano** should be considered extravagant, it would seem clear that **Massiah** and **Escobedo** would bar a statement by an accused if the sum total of the circumstances showed an effective deprival of the advantage of counsel, even though the statement was made without coercion.

That sum total of circumstances was present here.

The government, in the person of the Federal Bureau of Investigation agent who interrogated the defendant, knew that the defendant had an attorney and knew that the attorney was out of town and unavailable but went ahead with the interrogation anyway, informing the defendant that the presence of his attorney was not necessary. Prosecution of the defendant commenced within eleven days, and it seems beyond fair challenge that it was, at the time defendant's statement was taken, focused upon him.

Like Escobedo, defendant was a layman, and he could not be expected to know that under the liberal rules of evidentiary admissibility prevalent in the Federal courts his past misdeeds (the so-called "fictitious" or "non-

[2] Both Massiah and Escobedo were, however, cited in the petition for rehearing in the Court of Appeals.

existent" oil contracts) could be received as showing a subsequent criminal intent. Unlike Escobedo, who knew that a criminal prosecution of someone was in preparation (he was interviewed while in custody, in a police station), defendant was interviewed under conditions which permitted the inference that criminal action was not in contemplation. The government, in its written statement prepared for defendant's signature, inserted the recitation that "I * * * realize that any statement made by me may be used against me in a court of law," but this was rendered equivocal, at best, by the circumstance that a proceeding in bankruptcy was then pending.

Had Trout's interrogation been in civil case, and had Trout then occupied the position of attorney for the government, his position as an ethical lawyer would have been impossible. **Escobedo v. Illinois, 12 L. Ed. 2d 977, 983-984,** footnote 7: **People v. Donovan, 13 N. Y. 2d 148, 152.**

[b]

Place of Prosecution.

The information charged that on Oct. 30, 1959, again on Apr. 25, 1960, and again on Dec. 13, 1960, the defendant,

> "in the City of Alhambra, County of Madison, State of Illinois, in the Southern Division of the Southern District of Illinois, and within the jurisdiction of this court, * * * did knowingly make a false statement and report and wilfully overvalue property and security, that is, the defendant did file a grain inventory statement * * * by submitting said false statement to the St. Louis Bank of Cooperatives, well knowing the same to be false when made; in violation of Section 1014, Title 18, U. S. Code."

There was no evidence (and no contention by the government) that the statements were filed with or submitted

to the St. Louis Bank of Cooperatives anywhere in the State of Illinois; the evidence was that they were filed with and submitted to the St. Louis Bank of Cooperatives in the State of Missouri (App. 68, 69).[2] There was evidence that the defendant supplied information used in the composition of the statements in the State of Illinois, within the territorial jurisdiction of the lower court (App. 68), and that the statements were later deposited in the mail in the State of Illinois, within the lower court's jurisdiction, addressed to the St. Louis Bank of Cooperatives in the State of Missouri (App. 68). There was no evidence that the defendant deposited them in the mail. There was no evidence that the defendant directed their deposit in the mail.

From the inception of the trial below, the defendant challenged the government on the ground that although the information charged a crime committed in the Southern Judicial District of Illinois the proofs were of an alleged crime committed in the Eastern District of Missouri. The challenge was made by motions for acquittal after the government's opening statement, after the close of the government's case in chief, after the close of all the evidence in the case, and after the verdict (App. 8, 9).

All of the defendant's motions were denied by the learned trial judge because, in his view, the prosecution was covered by **U. S. C., Tit. 18, § 3237 (a)**:

> "Except as otherwise provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed."

* * * * * * *

U. S. C., Tit. 18, § 1014, under which the instant prosecution is brought, provides that

> "Whoever knowingly makes any false statement or report, or wilfully overvalues any land, property or security, for the purpose of influencing in any way the action of the * * * Farm Credit Administration, * * * or any division, officer, or employee thereof, * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both."

The gist of the offense is the attempt to influence, and this requires communication of the false statement, report or valuation. The word "*makes*" in the statute is not employed in the sense of "*composes*" or "*fabricates*" but in the sense of "*delivers*" or "*communicates*". **Reass v. U. S. [C. A.—4], 99 F. 2d 752, 755:**

> "[C]ommunication of the false statements to the corporation constitutes the very essence of the crime. It is in this sense that the statute condemns the making of a false statement for the purpose of influencing the bank. The mere assembling of the material and its arrangement in a written composition containing the misrepresentations of fact can have no effect, and it is only when they are communicated to the lending bank that the crime takes place."

And so the draftsman of the information in the case at bar substantially conceded in composing the accusation, for in each count, he laid the charge that the defendant "did make" the false statement under a videlicet specifying that the defendant did so by filing a false grain inventory by submitting it to the lending bank. He had preceded this by asserting that it was done

> "in the City of Alhambra, County of Madison, State of Illinois, in the Southern Division of the Southern District of Illinois."

We feel and respectfully submit that **U. S. C., Tit. 18, § 3237 (a)**, cannot be utilized to sustain the government's

position below. "[T]he Trial of all Crimes * * * shall be held in the State where the said Crimes shall have been committed," **Art. III, § 2,** of the Constitution provides, and, "[a]s though to underscore the importance of this safeguard, it was reinforced by the provision of the Bill of Rights requiring trial 'by an impartial jury of the State and district wherein the crime shall have been committed' **[Amend. VI].**" **U. S. v. Johnson, 323 U. S. 273, 275, 65 S. Ct. 249, 89 L. Ed. 236, 238,** continuing **(323 U. S. 276, 89 L. ed. 239):**

> "Questions of venue in criminal cases * * * are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

In **Travis v. U. S., 364 U. S. 631, 636, 81 S. Ct. 358, 5 L. Ed. 2d 340, 345,** this Court said:

> "The Government admits that the filing [of a false non-communist affidavit with the National Labor Relations Board in Washington, D. C.] is necessary to the 'occurrence' of the offense, but it argues that the offense has its 'beginning' in Colorado [where the defendant placed the false affidavit in the mail], because it was there that the defendant had 'irrevocably set in motion and placed beyond his control the train of events which would normally result (and here did result) in the consummation of the offense.' We do not agree with this analysis. Venue should not be made to depend on the chance use of the mails, when Congress has so carefully indicated the locus of the crime. After mailing, the affidavit might have

been lost; petitioner himself might have recalled it [39 C. F. R. § 43.6 (a) provides: 'Mail deposited in a post office may be recalled by the sender, by the parent or guardian of a minor child, or by the guardian of a person of unsound mind].' Multiple venue in general requires crimes consisting of 'distinct parts' or involving a 'continuously moving act.' **U. S. v. Lombardo, 241 U. S. 73, 77, 60 L. Ed. 897, 898, 36 S. Ct. 508."**

In that case, as indicated by the quotation, the court rejected explicitly the identical contention sustained by the court below in the case at bar, that **§ 3237 (a)** would permit prosecution for the filing of a false instrument in the jurisdiction where it was composed and mailed. It rejected the contention, as we read the opinion, in part at least on the holding that **§ 3237** must be read in the light "of constitutional requirements." **364 U. S. 637, 5 L. Ed. 2d 345.** The constitutional requirements **(Art. III, § 2; Amend. VI)** are for trial where the crime has been committed, not where it was planned or prepared.

It is possible that a crime, of its nature, may consist either in a single act limited to one place, or in a continuing act or an act of distinct parts, not so limited. But if such is the case, and the prosecutor desires to prosecute under the multiple-venue aspects of the offense, he must draw the accusation in such manner that the multiple-venue nature of the particular offense charged is clear; otherwise, the accusation will be held to have charged a single-act offense, and **§ 3237** will be inapplicable. **U. S. v. Lefkoff [DC-Tenn.], 113 F. Supp. 551; U. S. v. Aaron [DC-W.Va.], 117 F. Supp. 952; Annotation to Travis v. U. S., "Multiple Venue of Federal Offenses," 5 L. Ed. 973, 989.** The reason for the requirement, we think, is quite obvious: the rule requiring certitude in accusation so as to prevent a second prosecution would otherwise simply

be sidestepped. The case at bar is illustrative. Ruehrup has been accused of filing false statements in Illinois, but he has been convicted on evidence that shows the filing of statements in Missouri; what now will prevent his prosecution under the same facts in the Eastern District of Missouri for the same offense?

In our view, § 1014 denounces a single-act offense only, which is not continuing and does not consist of parts and which, consistent with **Art. III, § 2**, and **Amend. VI** of the Constitution can be prosecuted only in the judicial district where the false statement or report is actually lodged with the agency. **Travis v. U. S., 364 U. S. 631, 81 S. Ct. 358, 5 L. Ed. 340; Reass v. U. S. [CA-4], 99 F. 2d 752; U. S. v. Lombardo, 241 U. S. 73, 36 S. Ct. 508, 60 L. Ed. 897; Wampler v. Snyder [CA-D. C.], 66 F. 2d 195; Eisler v. U. S. [CA-D. C.], 176 F. 2d 21; U. S. v. Valenti [CA-3], 207 F. 2d 242; Shurin v. U. S. [CA-4], 164 F. 2d 566.** If we are wrong, the instant prosecution is still infirm because the prosecutor, in drawing the information, elected to charge a single-act offense only, and charged it as having been in a jurisdiction where the government's own proof conclusively showed it did not occur.

The Court of Appeals, in disposing of the point, ruled that Travis "is limited to the statute there involved" and refused to accept it as controlling, instead following **Imperial Meat Co. v. U. S. [CA-10], 316 F. 2d 435**, and holding that Tit. 18, U. S. C., § 3237 (a), permitted prosecution in the Southern District of Illinois.

Imperial Meat Co. held, without reasoning or discussion, that Travis was not controlling. In doing so, it cited two cases—**U. S. v. Gross [CA-2], 276 F. 2d 816**, and **Henslee v. U. S. [CA-5], 262 F. 2d 750**—decided prior to **Travis.** The Court of Appeals below, in the case at bar, cited **De Rosier v. U. S. [CA-5], 218 F. 2d 420. De Rosier**, however,

was the basis of the Court of Appeals decision in Travis, reversed by this Court. **Travis v. U. S. [CA-10], 247 F. 2d 130, 134; Travis v. U. S., 364 U. S. 631, 81 S. Ct. 358, 5 L. Ed. 2d 340.**

CONCLUSION.

Wherefore, petitioner prays that this Court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit, to the end that its decision and judgment may be reviewed.

Respectfully submitted,

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APPENDIX.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 14542 September Term, 1963—April Session, 1964.

United States of America,
Plaintiff-Appellee,
v.
Elmer Ruehrup,
Defendant-Appellant.

Appeal from the United States District Court, Southern District of Illinois, Southern Division.

June 24, 1964.

Before Hastings, Chief Judge, and Schnackenberg and Swygert, Circuit Judges.

Hastings, Chief Judge. Defendant Elmer Ruehrup is appealing from a judgment of conviction and sentence imposed thereunder for making false statements for the purpose of influencing an agency of the Farm Credit Administration, in violation of 18 U. S. C. A., § 1014.[1]

The prosecution was by information, defendant having waived an indictment. The information was in three counts,

[1] "§ 1014. Loan and credit applications generally; renewals and discounts; crop insurance

"Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the * * * Farm Credit Administration, * * * or any division, officer, or employee thereof, * * * shall be fined not more than $5,000 or imprisoned not more than two years or both."

alleging the making of overstatements on October 20, 1959, April 25, 1960 and December 13, 1960 as to the quantity of soybeans held in the elevators of the Alhambra Grain and Feed Company (company), Alhambra, Illinois.

Defendant entered a plea of not guilty and trial was had by jury in the Southern District of Illinois. The jury verdict found defendant guilty on all three counts. Defendant was sentenced to the custody of the Attorney General for imprisonment for a period of two years on each count, the sentences to run concurrently. The sentence stated that defendant would become eligible for parole upon serving a term of four months. No fine was imposed.

In 1948, defendant became manager of the company, which had for years been a borrower from the St. Louis Bank of Cooperatives (bank) at St. Louis, Missouri, an agency of the Farm Credit Administration. The company, through defendant, periodically filed statements for purposes of credit with the bank showing the quantity of grain on hand.

The company, in connection with its grain storage business, engaged in processing soybeans into soybean oil and soybean meal by the so-called "expeller process." This process squeezed the beans between rollers and was less efficient than the "solvent extraction process," used by some competitors, which applied a chemical to the beans.

The company met the prices of competitors who used the more efficient method. In order not to show losses on its books, defendant did not enter the actual quantity of soybeans processed, rather, he entered the quantity which would have been processed if the more efficient method had been used. This practice resulted in recording a greater quantity of soybeans on the books than were in storage.

In January, 1961, the bank sent inspectors to the company to measure the amount of soybeans in storage. De-

fendant admitted, prior to such measurement, that there were approximately 100,000 fewer bushels in storage than recorded on the books. This approximation proved to be substantially correct.

The company was adjudicated a bankrupt. On January 10, 1964, defendant was convicted and sentenced.

On appeal, defendant contends that the district court committed reversible error by denying motions for acquittal due to improper venue; permitting a self-incriminatory statement signed by defendant to be admitted into evidence; refusing to expunge a portion of this statement from evidence; and improperly ruling on objections to testimony.

I

Defendant urges that since the alleged false statements and reports were submitted to the St. Louis Bank of Cooperatives in St. Louis, Missouri, venue was solely in the Eastern District of Missouri and that the trial court erred in denying his motions for acquittal.

Defendant contends that the offense proscribed in 18 U. S. C. A. § 1014, fn. 1, *supra*, is the delivery or communication of the false statement, and this occurred only in St. Louis. He relies on U. S. Const., Art. III, § 2,[2] U. S. Const. amend. VI[3] and **Travis v. U. S.**, 364 U. S. 631 (1961).

In **Travis**, "petitioner was charged * * * with the making and filing of false non-Communist affidavits required by § 9 (h) of the National Labor Relations Act." *Id.* at 632. Petitioner executed and mailed the alleged false writings

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"The Trial of all Crimes * * * shall be held in the State where the said Crimes shall have been committed * * *."

3 "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *."

in Colorado and they were filed with the National Labor Relations Board in Washington, D. C. Petitioner was indicted and convicted in the United States District Court for the District of Colorado. The Supreme Court reversed the conviction and held that venue lay only in the District of Columbia.

The Supreme Court stated in **Travis** that: "Section 9 (h) of the National Labor Relations Act, with which we are concerned, did not require union officers to file non-Communist affidavits. If it had, the whole process of filing, including the use of the mails, might logically be construed to constitute the offense. But this statutory design is different. It requires that the Board shall make no investigation nor issue any complaint in the matters described in § 9 (h) 'unless there is on file with the Board' a non-Communist affidavit of each union officer. The filings are conditions precedent to a union's use of the Board's procedures. * * * The words of the Act—'unless there is on file with the Board'—suggest to us that the filing must be completed before there is a 'matter within the jurisdiction' of the Board within the meaning of the false statement statute. When § 9 (h) provides the criminal penalty, it makes the penal provisions applicable 'to such affidavits,' *viz.*, to those 'on file with the Board.'" *Id.* at 635, 636.

We agree with the Tenth Circuit that **Travis** is not controlling and is limited to the statute there involved. **Imperial Meat Company v. United States**, 10 Cir., 316 F. 2d 435, 440 (1963).

We conclude, as did the district court, that 18 U. S. C. A., § 3237 (a)[4] is controlling.

[4] "§ 3237. Offenses begun in one district and completed in another

"(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in

The following events occurred in Illinois in the instant case. Defendant prepared rough drafts of the statements in issue. A stenographer typed the statements and submitted them to defendant for approval. The stenographer deposited the statements in the mail.

These events were the beginning of the offenses charged and the offenses were completed when the statements were received by the bank. See **De Rosier v. United States,** 5 Cir., 218 F. 2d 420, 422 (1955), cert. denied, 349 U. S. 921.

We find no merit in defendant's contention that the wording of the information[5] was so vague that defendant could now be subsequently prosecuted in the Eastern District of Missouri on charges arising from the same written statements in issue here.

We hold that venue was properly laid in the Southern District of Illinois and the trial court's denial of motions for acquittal was not error.

II.

Defendant asserts that the district court committed prejudicial error in overruling his objection to the admis-

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one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

[5] The information charged that on October 20, 1959, April 25, 1960, and on December 13, 1960, the defendant,

"in the City of Alhambra, County of Madison, State of Illinois, in the Southern Division of the Southern District of Illinois, and within the jurisdiction of this court, * * * did knowingly make a false statement and report and wilfully overvalue property and security, that is, the defendant did file a grain inventory statement * * * by submitting said false statement to the St. Louis Bank of Co-operatives, well knowing the same to be false when made; in violation of Section 1014, Title 18, U. S. Code."

sion in evidence of a statement signed by him in the absence of his attorney.

On August 8, 1962, Robert Trout, a Special Agent of the Federal Bureau of Investigation, called at defendant's farm home to question him concerning possible criminal aspects of the soybean shortage.

Trout testified at the trial that, "at the beginning of the interview * * * I explained the nature of my visit to * * * [defendant] and informed him that he was under no obligation to discuss the matter * * * unless he desired to do so and that prior to discussing it, if he wished, he had the right to consult an attorney."

Defendant informed Trout that his attorney was out of town. Trout told him that it was not necessary the attorney be present. Defendant stated that he had made several statements to others and had no objection to discussing the matter.

At the conclusion of their talk, Trout told defendant he desired to reduce the information to a written statement to be signed by defendant. Defendant replied he would sign such a statement.

Trout prepared a statement in the first person and the following morning defendant signed it in the presence of Trout and defendant's wife, who signed as witnesses.

Defendant testified as follows concerning his signing the statement:

> "The Court: And the very first paragraph [of the signed statement] said this, 'I Elmer H. Ruehrup, make the following voluntary statement to Special Agent Robert B. Trout, who has identified himself to me as a Special Agent of the Federal Bureau of Investigation, United States Department of Justice. No threats, promises, or duress of any kind have been used to induce me to make this statement. I realize that I have the right to consult an attorney prior to

making any statement, and I also realize that any statement made by me may be used against me in a court of law.'

"Now that paragraph was in there, and you read it, is that correct?

"The Witness [Defendant]: Yes, sir.

"The Court: And you signed it after you read it, is that correct?

"The Witness [Defendant]: Yes, sir."

Defendant cites **Spano v. New York**, 360 U. S. 315 (1959), and argues his constitutional rights were violated in that he was denied effective representation of counsel. He asserts that he "occupied the same position as one under arrest," since "[w]ithin eleven days * * * [of the signing of the statement] the government was ready to initiate prosecution, and it is fair to infer that prosecution was in mind when Tront was questioning the defendant and preparing a statement for him to sign."

We find no similarity between **Spano** and the instant case. In **Spano**, petitioner had been indicted for first-degree murder. He retained counsel who instructed him to answer no questions. Petitioner was thereafter subjected to persistent and continuous questioning. He repeatedly requested and was denied an opportunity to consult his attorney. After eight hours of constant questioning he confessed. The Supreme Court reversed petitioner's conviction and stated that "petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused." *id.* at 323, and as a result his confession was not voluntary.

In the present case, defendant had full knowledge of his right to consult an attorney prior to signing the statement and that the statement could be used against him in court. With this knowledge, he voluntarily signed the statement. No constitutional right of defendant was violated and the district court did not err in admitting the statement in evidence.

III.

Defendant contends that, assuming the signed statement was admissible, the district court erred in refusing to expunge from such statement recitations of wrongdoing unconnected with the filing of false grain inventory reports.

These recitations concerned nonexistent oil contracts and were, *inter alia,* as follows: "In addition to the inventory shortage as indicated above, there is another shortage of $96,779.55 consisting of nonexistent oil contracts which were shown on the company books as assets. These oil contracts accumulated through the years 1956 to 1960 and were included in the records of the company in order that the company books would show a profit for the years in question even though there were actual losses during those years. * * *"

The trial court refused to expunge these recitations and held them admissible for two purposes: "I'll say that this is being admitted for two purposes: One, in response to a question that he did not know in the inventory what the oil contracts were. And, secondly, that the jury might take this into consideration for the sole and only purpose of arriving at intent, and not for the purpose of finding this man guilty under the charge on the indictment."

Judge Knoch, speaking for the court in *United States v. McCartney,* 7 Cir., 264 F. 2d 628, 631 (1959), cert. denied, 361 U. S. 845, said, "As a general rule, of course, evidence of another offense, wholly independent of the one charged is inadmissible. However, in this case, the conversation was part of the *res gestae.* * * * Evidence even of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances thereof."

The misrepresentation of the soybean inventory and the making of nonexistent oil contracts had the same effect and

purpose, in part, *viz.*, increasing the assets on the company's books and enabling the company to show a "paper" profit.

Part of the requisite intent with which defendant was charged (18 U. S. C. A., § 1014, fn. 1, *supra*) was knowingly making a false statement or wilfully overvaluing property. This same intent would be present if false contracts were drawn up by defendant to misrepresent the assets of the company.

IV.

Finally, defendant charges prejudicial error in the cross-examination of defendant and comment by the court.

Defendant and the witness who testified prior to him, Betty Volz, bookkeeper for the company, were asked questions on direct examination concerning the inventory kept by the company. Betty Volz was questioned about the accuracy of the inventory as shown on the company's books and whether she could explain the "great difference as appears purportedly between what the auditor for the Government has worked out here and what you reported on your inventory sheets?"

Defendant, on direct examination, was asked whether the books "were kept accurately insofar as sales and purchases were concerned?" Thus, the issue of the accuracy of the company's books and the inventory as recorded thereon was raised by defendant on direct examination.

On cross-examination, defendant was questioned concerning how the company compiled a balance sheet. He was asked, "You wouldn't know what this figure, future trade oil would indicate?" He answered, "Not as such, no, sir."

In an apparent attempt to discredit this answer, Government counsel confronted defendant with defendant's signed written statement and directed defendant's atten-

tion to the portions pertaining to the nonexistent oil contracts.

The district court in overruling an objection said, in part, "I'll say that this is being admitted for two purposes: One, in response to a question that * * * [defendant] did not know in the inventory what the oil contracts were."

Upon further cross-examination, defendant admitted that the item entitled "future trade oil" on the balance sheet represented nonexistent oil contracts.

Defendant urges this cross-examination improperly went beyond matters touched upon in direct examination and that the statement of the district court in overruling defendant's objection was highly prejudicial since it implied that defendant had lied.

The extent of cross-examination is within the sound discretion of the trial judge who is in the best position to determine how far it should proceed. *United States of America* v. *Alfred Joseph Keig, Sr.*, 7 Cir., ... F. 2d ..., ... (June 16, 1964); *United States* v. *Keegan*, 7 Cir., ... F. 2d ..., ... (April 2, 1964); *United States* v. *Lawinski*, 7 Cir., 195 F. 2d 1, 7-8 (1952); *Gerber* v. *United States*, 6 Cir., 145 F. 2d 966, 970 (1944).

We hold this cross-examination was properly within the matters inquired into upon direct examination and that there was no abuse of discretion by the trial court. We find no prejudice to defendant in the court's comment.

The judgment appealed from is affirmed.

AFFIRMED.